

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARLENE JOHNSON,) 1:05-CV-00171-OWW-SMS
)
Plaintiff,) FINDINGS AND RECOMMENDATION THAT
v.) PLAINTIFF'S SOCIAL SECURITY
) COMPLAINT BE GRANTED (DOC. 1)
JO ANNE B. BARNHART,)
Commissioner of Social)
Security,)
Defendant.)
)
)

Plaintiff is proceeding with counsel and is seeking judicial review of a final decision of the Commissioner of Social Security (Commissioner) denying an application for benefits. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 72-302(c)(15). The matter is currently before the Court on the parties' briefs, which have been submitted without oral argument.

HISTORY

A prior application for Supplemental Security Income payments (SSI) and Disability Insurance Benefits (DIB), filed on August 5, 1999, was determined adversely to Plaintiff by an unfavorable, post-hearing decision dated December 28, 2000, (Tr.

53-58), which the Appeals Council subsequently determined did not merit review on February 1, 2002 (Tr. 19, 61-62).

Plaintiff then on April 1, 2002, filed the application for SSI and DIB that is the subject of review in the present proceeding, alleging disability commencing on June 11, 1999, due to left carpal tunnel (CTS) resulting from favoring the carpal tunnel on the right, injury to the thoracic area in 1985, left pelvic bone that turned inward and pulled the low back and right hip, making the right leg shorter and causing low back pain and sciatica, all of which became more painful the longer that Plaintiff stayed on her feet; further, work and upright positions stressed her back and body, causing spasms of the injured areas. (Tr. 85-109, 271-74.)

After Plaintiff's claim was denied initially and on reconsideration, Plaintiff requested, and appeared at, a hearing before the Honorable James N. Baker, Administrative Law Judge (ALJ) of the Social Security Administration (SSA), on August 26, 2003. Plaintiff appeared with an attorney and testified; a Spanish interpreter also was present. (Tr. 19-26.) On January 30, 2004, the ALJ denied Plaintiff's application for benefits. (Id. at 19-26.) Plaintiff appealed the ALJ's decision to the Appeals Council. After the Appeals Council denied Plaintiff's request for review on December 4, 2004, (Tr. 6-9), Plaintiff filed the complaint in this action on February 4, 2005. Briefing commenced on October 4, 2005, and was completed with the filing on October 24, 2005, of Defendant's brief.

STANDARD AND SCOPE OF REVIEW

Congress has provided a limited scope of judicial review of

1 the Commissioner's decision to deny benefits under the Act. In
2 reviewing findings of fact with respect to such determinations,
3 the Court must determine whether the decision of the Commissioner
4 is supported by substantial evidence. 42 U.S.C. § 405(g).
5 Substantial evidence means "more than a mere scintilla,"
6 Richardson v. Perales, 402 U.S. 389, 402 (1971), but less than a
7 preponderance, Sorenson v. Weinberger, 514 F.2d 1112, 1119, n. 10
8 (9th Cir. 1975). It is "such relevant evidence as a reasonable
9 mind might accept as adequate to support a conclusion."
10 Richardson, 402 U.S. at 401. The Court must consider the record
11 as a whole, weighing both the evidence that supports and the
12 evidence that detracts from the Commissioner's conclusion; it may
13 not simply isolate a portion of evidence that supports the
14 decision. Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985).
15 It is immaterial that the evidence would support a finding
16 contrary to that reached by the Commissioner; the determination
17 of the Commissioner as to a factual matter will stand if
18 supported by substantial evidence because it is the
19 Commissioner's job, and not the Court's, to resolve conflicts in
20 the evidence. Sorenson v. Weinberger, 514 F.2d 1112, 1119 (9th
21 Cir. 1975).

22 In weighing the evidence and making findings, the
23 Commissioner must apply the proper legal standards. Burkhart v.
24 Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must
25 review the whole record and uphold the Commissioner's
26 determination that the claimant is not disabled if the
27 Commissioner applied the proper legal standards, and if the
28 Commissioner's findings are supported by substantial evidence.

1 See, Sanchez v. Secretary of Health and Human Services, 812 F.2d
2 509, 510 (9th Cir. 1987); Jones v. Heckler, 760 F.2d at 995. If
3 the Court concludes that the ALJ did not use the proper legal
4 standard, the matter will be remanded to permit application of
5 the appropriate standard. Cooper v. Bowen, 885 F.2d 557, 561 (9th
6 Cir. 1987).

7 ANALYSIS

8 In order to qualify for benefits, a claimant must establish
9 that she is unable to engage in substantial gainful activity due
10 to a medically determinable physical or mental impairment which
11 has lasted or can be expected to last for a continuous period of
12 not less than twelve months. 42 U.S.C. §§ 416(i), 1382c(a)(3)(A).
13 A claimant must demonstrate a physical or mental impairment of
14 such severity that the claimant is not only unable to do the
15 claimant's previous work, but cannot, considering age, education,
16 and work experience, engage in any other kind of substantial
17 gainful work which exists in the national economy. 42 U.S.C.
18 1382c(a)(3)(B); Quang Van Han v. Bowen, 882 F.2d 1453, 1456 (9th
19 Cir. 1989). The burden of establishing a disability is initially
20 on the claimant, who must prove that the claimant is unable to
21 return to his or her former type of work; the burden then shifts
22 to the Commissioner to identify other jobs that the claimant is
23 capable of performing considering the claimant's residual
24 functional capacity, as well as her age, education and last
25 fifteen years of work experience. Terry v. Sullivan, 903 F.2d
26 1273, 1275 (9th Cir. 1990).

27 The regulations provide that the ALJ must make specific
28 sequential determinations in the process of evaluating a

1 disability: 1) whether the applicant engaged in substantial
2 gainful activity since the alleged date of the onset of the
3 impairment, 20 C.F.R. § 404.1520 (1997);¹ 2) whether solely on the
4 basis of the medical evidence the claimed impairment is severe,
5 that is, of a magnitude sufficient to limit significantly the
6 individual's physical or mental ability to do basic work
7 activities, 20 C.F.R. § 404.1520(c); 3) whether solely on the
8 basis of medical evidence the impairment equals or exceeds in
9 severity certain impairments described in Appendix I of the
10 regulations, 20 C.F.R. § 404.1520(d); 4) whether the applicant
11 has sufficient residual functional capacity, defined as what an
12 individual can still do despite limitations, to perform the
13 applicant's past work, 20 C.F.R. §§ 404.1520(e), 404.1545(a); and
14 5) whether on the basis of the applicant's age, education, work
15 experience, and residual functional capacity, the applicant can
16 perform any other gainful and substantial work within the
17 economy, 20 C.F.R. § 404.1520(f).

18 With respect to SSI, the five-step evaluation process is
19 essentially the same. See 20 C.F.R. § 416.920.

20 Here, the ALJ noted that the presumption of nondisability
21 from the previous decision continued, and he concluded that
22 Plaintiff had not demonstrated significantly changed
23 circumstances from those attending the previous decision.
24 Plaintiff had a combination of impairments considered severe
25 which did not meet any listing, but Plaintiff retained the RFC to
26 perform light work with no repetitive cervical movements, and she
27

28 ¹ All references are to the 2004 version of the Code of Federal Regulations unless otherwise noted.

1 should not sit in a forward position without a back support, and
2 should not reach overhead or push or pull more than occasionally;
3 thus, Plaintiff was able to perform her past relevant work as a
4 childcare worker and was not disabled. (Tr. 25-26.)

5 I. Application of Chavez v. Bowen

6 The Court rejects Plaintiff's argument that the ALJ failed
7 to note or apply the applicable law of Chavez v. Bowen, 844 F.2d
8 691 (9th Cir. 1988). The pertinent principles have been
9 established:

10 This court has stated that an ALJ's finding that a
11 claimant is not disabled "create[s] a presumption that
12 [the claimant] continued to be able to work after that
13 date." Miller v. Heckler, 770 F.2d 845, 848 (9th
14 Cir.1985). The presumption does not apply, however, if
15 there are "changed circumstances." Taylor v. Heckler,
16 765 F.2d 872, 875 (9th Cir.1985). An increase in the
17 severity of the claimant's impairment would preclude
18 application of res judicata. Id. The claimant need not,
19 however, demonstrate that his medical or psychiatric
20 condition has worsened to show changed circumstances. Other
changes suffice. For example, a change in the claimant's age
category, as defined in the Medical-Vocational Guidelines,
constitutes a changed circumstance that precludes the
application of res judicata. Chavez v. Bowen, 844 F.2d 691,
693 (9th Cir.1988). In addition, the Commissioner may not
apply res judicata where the claimant raises a new issue,
such as the existence of an impairment not considered in the
previous application. Gregory v. Bowen, 844 F.2d at 666. Nor
is res judicata to be applied where the claimant was
unrepresented by counsel at the time of the prior claim. Id.

21 Lester v. Chater, 81 F.3d 821, 827-28 (9th Cir. 1995) (footnote
22 omitted).

23 Here, in the decision under review in this proceeding, the
24 ALJ expressly stated that he considered the previous decision to
25 be res judicata as to residual functional capacity (RFC),
26 severity of the impairment and its meeting or a listing or
27 durational requirement, the physical or mental demands of the
28 claimant's past relevant work, age, education, and work

1 experience, including the skill level of the Plaintiff's past
2 relevant work, when adjudicating a new period of disability;
3 further, the ALJ noted that absent new and material evidence or
4 changes in legal requirements, the question of making a
5 subordinate finding regarding credibility did not arise. (Tr. 19-
6 20.) The ALJ then proceeded to complete the five-step disability,
7 considering whether new and material evidence demonstrated a new
8 impairment (Tr. 21, 24), the meeting of listing (Tr. 21), or a
9 change in the RFC (Tr. 21-25), making express conclusions on each
10 of these issues. He also concluded that no new and material
11 evidence had been presented relative to any past relevant work
12 and that thus Plaintiff could perform her past relevant work as a
13 childcare worker as she performed it in the past. (Tr. 25.) He
14 considered new vocational testimony and concluded expressly that
15 Plaintiff was able to return to her past relevant work and thus
16 was not disabled. (Tr. 25.)

17 II. Age Category

18 Likewise, the Court rejects Plaintiff's contention that the
19 ALJ failed to report the changed circumstance of Plaintiff's age.
20 Plaintiff does not cite to the record in support of this
21 argument. The Court notes that in a colloquy with the VE and
22 Plaintiff's attorney, the present ALJ characterized Plaintiff's
23 age of almost 58 (apparently her age during the previous
24 proceeding) as advanced age. (Tr. 45.) Plaintiff testified that
25 she was born on July 26, 1941, (Tr. 29), which means that at the
26 time of the previous decision on December 28, 2000, Plaintiff was
27 fifty-nine years old, whereas at the time of the decision under
28 review here, namely, January 29 or 30, 2004, Plaintiff was sixty-

1 two. As Defendant notes, both of these ages are within the
2 category of "advanced age," of fifty-five and over, as defined by
3 20 C.F.R. § 404, Appendix 2, subpart P, §§ 200(f), 202.

4 II. Step Two

5 Plaintiff argues that the ALJ erred in finding that
6 Plaintiff had not sustained her burden of showing a worsening
7 impairment or impairments because she demonstrated fibromyalgia
8 and CTS, impairments which were not found to have been severe in
9 the previous decision, in which only Plaintiff's cervical disc
10 disease was found to be severe.

11 In the previous decision, the ALJ found that Plaintiff's
12 degenerative disc disease was severe. (Tr. 54.) However, the
13 previous ALJ concluded that Plaintiff had overestimated the
14 impact of her impairments on her ability to work, (Tr. 55).

15 The ALJ who authored the present decision expressly
16 concluded that Plaintiff's degenerative disc disease was not
17 severe enough to meet or medically equal a listing, and that
18 Plaintiff had not provided new and material evidence that showed
19 that Plaintiff had a new impairment. (Tr. 21.)

20 He reviewed the medical evidence regarding Plaintiff's
21 cervical spine that reflected only degenerative changes with
22 narrowing of the left C5-6 intervertebral foramina in January
23 2000, and small spurs of the lower vertebral segment and slight
24 narrowing of the left-sided C4-5 and C5-6 intervertebral foramina
25 with no spinal stenosis in March 2000. (Tr. 22, 184, 181.)

26 With respect to CTS, the previous ALJ had noted Plaintiff's
27 subjective claim of having been disabled by CTS of her right
28 hand, (Tr. 55); reviewed a diagnosis of right CTS in 1986 and

1 noted her CTS release surgery in 1987; and then observed that her
2 medical records revealed few, if any, significant continued
3 symptoms, (Tr. 56). He concluded that Plaintiff could perform a
4 full range of light work with avoidance of repetitive cervical
5 movements and sitting in a forward position without a back
6 support, and only occasional reaching overhead or pushing or
7 pulling. (Tr. 57.)

8 The ALJ who authored the decision being reviewed here
9 concluded, as did the previous ALJ, that Plaintiff
10 was not totally credible, or credible with respect to the impact
11 of her impairments upon her ability to work. (Tr. 22, 25.) He
12 cited the credibility factors relied upon by the previous ALJ and
13 the lack of new and material evidence to upset this finding. (Tr.
14 22.) The second ALJ expressly noted that Plaintiff's present
15 testimony was consistent with her previous testimony. He then
16 noted a treating physician's indication in February 2001 that
17 Plaintiff's subjective complaints of pain might be related to her
18 application for disability benefits and thus indicate a concern
19 for secondary gain (Tr. 158, reflecting Plaintiff's report in a
20 cardiology follow-up that although she was feeling good and was
21 not having much in the way of pain, she wanted to be certain that
22 the treaters recorded that she was having a lot of arm and neck
23 pain because that "might be important to Social Security,"); an
24 absence of any anxiety or depression in September 2001 during a
25 visit to the orthopedic clinic in September 2001 (Tr. 147);
26 Plaintiff's questionable medical compliance when she stopped
27 taking her medications in April 2002 (Tr. 143, reflecting that
28 Plaintiff stopped the Voltaren and did not start Imipramine

1 because she did not want to take any medications as long as she
2 did not have to do so); a lack of treatment in 2002-2003; and
3 Plaintiff's report to urgent care in April 2000 that she had come
4 primarily for documentation of her falling for the last two days
5 for Social Security purposes, which again indicated secondary
6 gain concerns (Tr. 179, 22). The ALJ concluded that these factors
7 only compounded the credibility problem. (Tr. 22.)

8 The ALJ noted Plaintiff's treatment from January 2000
9 through June 2003 at Stanislaus County Health Services Agency
10 (HSA) for a variety of complaints including pain in the neck,
11 upper extremity, lower back, pelvis, chest, shoulder, hip,
12 thoracic spine, head, lower quadrant of the abdomen, and mouth;
13 and for conditions including cervicobrachial syndrome--left,
14 carpal tunnel syndrome--bilateral, short right leg--3/4 inch
15 congenital, mild hyperpronation of the forefeet, fibromyalgia
16 rheumatica, headaches, menopause, a fall, elevated blood
17 pressure, and dizziness. (Tr. 23, Tr. 137-84, 235-51, 262-70.) He
18 reviewed the treatment, which included medications (Elavil,
19 Imipramine), x-rays, CT scans, pelvic ultrasounds, cardiology
20 referrals (treadmill test and Thallium study), pain management
21 consultations, orthopedic clinic evaluations, aerobic exercises,
22 and information regarding cervical pillows and electrical muscle
23 stimulation devices. (Tr. 23.)

24 In the previous decision, Plaintiff's CTS right was
25 considered, as were her left neck and shoulder impairment and
26 right hip pain. (Tr. 55.) Plaintiff reported then that she tried
27 not to stand for longer than fifteen to twenty minutes or bend
28 over a desk for longer than thirty minutes; she cooked, cleaned,

1 shopped, ran errands, and played card games, adjusting her method
2 of participating in such activities so as to avoid neck strain.
3 (Tr. 55-56.)

4 Plaintiff points to evidence that Plaintiff claims reflects
5 that her CTS and fibromyalgia are documented. This evidence
6 includes clinic notes from HSA that reflect her subjective
7 complaints and examinations resulting in assessments that she had
8 those conditions, including clinic notes from April 2002
9 indicating treatment consisting of no prescriptions, but aerobic
10 exercise, cervical pillow, and handouts regarding electrical
11 muscle stimulation devices and glucosamine sulfate (Tr. 143-44);
12 a clinic note from September 2001 reflecting complaints of pain,
13 stiffness, fatigue, and limited activities, with objective signs
14 of some limited range of motion of the head and neck, and normal
15 grip, abduction, strength to elbow flexion and extension,
16 shoulder abduction, adduction, and internal and external
17 rotators; normal sensation of the dermatomes of the upper
18 extremities, and normal deep tendon reflects of the biceps,
19 triceps, and brachioradialis; the treatment was a heel lift for
20 the right foot, glycosamine sulfate, aerobic exercises to pulse
21 of 130 beats per minute, and seminars and follow-up (Tr. 147); a
22 clinic note from July 2001 revealing mild hyperpronation of the
23 forefeet, normal gait, and need for a 3/4 inch lift under the
24 right foot to level the pelvis (Tr. 151); findings including
25 tenderness in August 2001 and April 2002 (Tr. 148, 144, 142),
26 seventy-five degrees of straight leg raising, right and left,
27 with no pain on the right and pain just posterior to the greater
28 trochanter on the left in July 2001 (Tr. 151); some restricted

1 range of motion of the head and neck in September 2001 (Tr. 146);
2 and continued lower back pain and limited movement with stable
3 gait in July 2002, treated with exercise and capsaicin cream (Tr.
4 138).

5 Although Plaintiff asserts that this would establish a
6 worsening of her impairments, the question is whether the ALJ's
7 determination that Plaintiff's functioning limitations were not
8 further restricted was supported by substantial evidence.

9 Consultative examiner Dr. Dhaliwal in October 2002 concluded that
10 although there was spinal tenderness, there was no Tinel's or
11 Phalen's sign or any other evidence of carpal tunnel syndrome;
12 motor strength was 5/5 in upper and lower extremities, including
13 grip strength; he diagnosed possible flexor or extensor
14 tendonitis of the forearm; he mentioned possible carpal tunnel
15 syndrome, although he felt that it was related to her tendonitis.
16 (Tr. 188.) Plaintiff's fibromyalgia was not shown to have been
17 comprehensively diagnosed or treated; it simply appears as a
18 diagnosis in August 2001 after an exam in which spinal tenderness
19 was observed but without reference to specific clinical findings.
20 (See Tr. 149.) Plaintiff's evidence did not require a finding
21 that her CTS and fibromyalgia were separately or in combination
22 severe because Plaintiff did not establish that she suffered
23 functional limitations from these ailments, which were treated
24 intermittently but conservatively with medication, exercise,
25 diet, cervical pillow, and a heel lift. (Tr. 143, 144, 147, 149,
26 151, 237.)

27 The ALJ reviewed the evidence concerning Plaintiff's lumbar
28 spine, left shoulder, right hip, and pelvic condition or

1 condition concerning Plaintiff's pain from having one leg shorter
2 than the other. (Tr. 22.) The ALJ considered the x-ray of
3 Plaintiff's lumbar spine taken in April 2000, which showed
4 minimal degenerative changes, maintenance of the vertebral and
5 disc height, small spurs of the cortices, sclerotic change of the
6 sacroiliac joints, but no spinal stenosis or osteopenia (Tr.
7 177); the x-ray taken in March 2001 of Plaintiff's left shoulder,
8 which was normal (as was Plaintiff's right hip, also studied on
9 the same day) (Tr. 155); and the August 2001 pelvic x-ray taken
10 in connection with Plaintiff's shorter leg pain, which was
11 normal, revealing normal sacroiliac and hip joints and no
12 fracture or spurring (Tr. 245).

13 The Court concludes that the record contains substantial
14 evidence supporting the ALJ's conclusion that Plaintiff had not
15 established additional severe impairments or worsening of
16 impairments.

17 III. Expert Opinions of Plaintiff's Capacity

18 Plaintiff complains of the ALJ's treatment of the expert
19 opinions.

20 Plaintiff notes that her treating "doctor" opined that her
21 osteoarthritis had worsened to the point that Plaintiff could not
22 work an eight-hour day because of her pain, pointing to the
23 opinion of Dan Cox, PA-C of July 2003 based on x-rays showing the
24 condition in the cervical and lumbar spine treated by oral
25 medications and physical therapy with poor response and guarded
26 prognosis resulting in a capacity to lift and carry up to ten
27 pounds frequently, up to twenty pounds occasionally, sit two to
28 three hours per day, stand and/or walk one hour, lie elevated two

1 to three hours, occasionally climb, stoop, crouch, kneel, and
2 crawl, and do so without any limitations of the hands, hearing,
3 or speaking. (Tr. 230-34.)

4 An ALJ may disregard a treating physician's opinion that is
5 controverted by other opinions only by setting forth specific,
6 legitimate reasons for doing so that are based on substantial
7 evidence in the record. Rodriguez v. Bowen, 876 F.2d 759, 762 (9th
8 Cir. 1989). This burden is met by stating a detailed and thorough
9 summary of the facts and conflicting clinical evidence, stating
10 the interpretation of the evidence, and making findings. Cotton
11 v. Bowen, 799 F.2d 1403, 1408 (9th Cir 1986). However, if the
12 medical opinion of a claimant's treating physician is
13 uncontroverted, then an ALJ must present clear and convincing
14 specific reasons, supported by substantial evidence in the
15 record, for rejecting the uncontroverted medical opinion of a
16 claimant's treating physician. Holohan v. Massanari, 246 F.3d
17 1195, 1203 (9th Cir. 2001). A failure to set forth a reasoned
18 rationale for disregarding a particular treating physician's
19 findings is legal error. Cotton v. Bowen, 799 F.2d at 1408.

20 The medical opinion of a nontreating doctor may be relied
21 upon instead of that of a treating physician only if the ALJ
22 provides specific and legitimate reasons supported by substantial
23 evidence in the record. Holohan v. Massanari, 246 F.3d 1195, 1202
24 (9th Cir. 2001) (citing Lester v. Chater, 81 F.3d 821, 830 (9th
25 Cir. 1995)). The contradictory opinion of a nontreating but
26 examining physician constitutes substantial evidence, and may be
27 relied upon instead of that of a treating physician, where it is
28 based on independent clinical findings that differ from those of

1 the treating physician. Andrews v. Shalala, 53 F.3d 1035, 1041
2 (9th Cir. 1995). The opinion of a nontreating, nonexamining
3 physician can amount to substantial evidence as long as it is
4 supported by other evidence in the record, such as the opinions
5 of other examining and consulting physicians, which are in turn
6 based on independent clinical findings. Andrews v. Shalala, 53
7 F.3d at 1041.

8 Here, the ALJ gave little weight to the opinion of Dan M.
9 Cox, PA-C² of the Stanislaus County Family Practice Clinic,
10 because 1) it was inconsistent with Plaintiff's daily activities
11 of caring for a disabled child, cooking, and doing laundry)³; 2)
12 it was an opinion on disability which was a subject reserved to
13 the Commissioner for decision; and 3) Dr. Castro was a kind and
14 caring physician who believed his patient, but the ALJ was "not
15 so sanguine." (Tr. 23.)

16 The ALJ correctly noted that he was not bound by the opinion
17 of the care provider regarding disability. A determination of
18 whether or not a claimant meets the statutory definition of
19 disability is a legal conclusion reserved to the Commissioner;
20 the opinion of a medical source on the ultimate issue of
21 disability is not conclusive. Magallanes v. Bowen, 881 F.2d 747,
22 751 (9th Cir. 1989). Further, where a treating source's opinion is
23 based largely on the Plaintiff's own subjective description of
24 her symptoms, and the ALJ has discredited the Plaintiff's claim
25

26 ² The name of the physician on the report was John Castro, a treating physician of Plaintiff, but the opinion
as signed by Dan Cox PAC. (Tr. 230, 234.) The ALJ referred to it as the report of Dr. Castro. (Tr. 23.)

27 ³ Dr. Castro stated at the end of his evaluation, "Mr. Milam, Mrs. Johnson is a 62 y/o [female] with a
28 chronic condition of osteoarthritis that takes care of an elderly mother and a mentally retarded son. She should be
granted disability." (Tr. 234.)

1 as to those subjective symptoms, the ALJ may reject the treating
2 source's opinion. Fair v. Bowen, 885 F.2d 597, 605 (9th Cir.
3 1989). As will be discussed hereinbelow, the ALJ rejected
4 Plaintiff's credibility on the basis of substantial evidence.
5 Further, it is permissible to rely on the Plaintiff's testimony
6 regarding her impairments in discrediting a treating physician's
7 opinion. Fisher v. Schweiker, 568 F.Supp. 900, 903 (N.D.Cal.
8 1983). Plaintiff testified that she mopped the floor in the
9 bathroom, cooked meals for herself and her son, did dishes, and
10 did laundry. (Tr. 35-37.) The Court concludes that the rejection
11 of the opinion was supported by specific and legitimate reasons,
12 was made according to correct legal standards, and was supported
13 by substantial evidence.

14 Plaintiff attacks the ALJ's acceptance of the opinion of the
15 consulting examiner but does not identify the "CE" of whom she
16 complains. (Brief at pp. 6-7.) The Court understands Plaintiff's
17 argument to concern Dr. Dhaliwal. The ALJ adverted to the
18 orthopedic consultative exam of October 2002 completed by Dr.
19 Navdeep Dhaliwal, who diagnosed possible degenerative disc
20 disease or facet arthropathy, possible degenerative arthritis of
21 the knee, possible tendonitis of the forearm, and possible CTS.
22 Dr. Dhaliwal found no evidence of radiculopathy or myopathy but
23 found decreased range of motion in the cervical and lumbar spine;
24 he opined that Plaintiff could stand and walk at least six hours
25 with frequent breaks, sit without restriction, lift fifteen
26 pounds frequently and twenty-five pounds occasionally, with
27 postural limitations of only occasional bending, stooping, and
28 crouching. (Tr. 23-24, 185-89.) The ALJ gave some weight to the

1 assessment because the report was comprehensive, and his
2 assessments were well explained, supported by objective findings,
3 and based on an actual examination of Plaintiff. (Tr. 24.)
4 Substantial evidence supports this assessment.

5 Plaintiff complains that the CE, again understood to be Dr.
6 Dhaliwal, missed finding any specific diagnosis, failed to review
7 any medical records, and concluded that there was CTS without
8 imposing hand limits; thus, the ALJ was required to develop the
9 opinion or put no weight on it.

10 The Court notes that the lack of a specific diagnosis
11 occurred in the context of the absence of clinical findings that
12 would have warranted an affirmative diagnosis, and thus it was
13 logical that no further diagnosis was made. The record was not
14 inadequate for the purpose of rendering a decision. The duty to
15 develop the record arises where the record before the ALJ is
16 ambiguous or inadequate to allow for proper evaluation of the
17 evidence. 20 C.F.R. §§ 404.1512(e) and 416.912(e); Mayes v.
18 Massanari, 262 F.3d 963, 968 (9th Cir. 2001). It was the burden of
19 the Plaintiff to establish that she was unable to perform her
20 past relevant work. Although the completeness of an examination
21 is a factor in weighing an opinion based on the exam, 20 C.F.R. §
22 416.927(d)(6), the Court is unaware of any principle of law that
23 provides that regardless of the nature and extent of a medical
24 examination, an opinion resulting from such an examination is
25 entitled to no weight if the examiner does not review medical
26 records.

27 Here, in any event, the consulting examiner reviewed
28 orthopedic clinic reports from Dr. Ambree and obtained specific

1 histories from Plaintiff of her various complaints and treatments
2 therefor. (Tr. 185-86.)

3 Finally, because the physician found no evidence of CTS and
4 felt that Plaintiff's left forearm pain was related to
5 tendonitis, and further opined that it was only possible that she
6 had CTS, the fact that the doctor did not posit restrictions
7 based on CTS does not detract from the opinion.

8 Plaintiff states that the ALJ gave great weight to the
9 opinions of the state medical consultants (DDS opinions) that
10 were in turn based in part on the opinion of Dr. Dhaliwal, whom
11 Plaintiff characterizes as "this errant CE." (Brief p. 6, Tr.
12 24.)

13 The Court has previously considered the weight given to Dr.
14 Dhaliwal's opinion. The ALJ expressly gave substantial weight to
15 the assessments of the state agency consultants because they were
16 familiar with the Social Security Disability program and its
17 evidentiary requirements, and their reports were consistent with
18 the previous ALJ's finding. (Tr. 24.) The Court interprets this
19 statement of reasons as referring to the professional background
20 and qualifications of the physicians involved as well as their
21 assessment of evidence, all of which are appropriate factors.
22 Greater weight will be given to opinions based on or supported by
23 relevant evidence, such as medical signs and laboratory findings.
24 20 C.F.R. § 404.1527(d)(3); 20 C.F.R. § 416.927(d)(3). Likewise,
25 the better an explanation a source provides for an opinion, the
26 more weight will be given to the opinion. Id. The more consistent
27 an opinion is with the record as a whole, the more weight will be
28 given to the opinion. 20 C.F.R. § 404.1527(d)(4); 20 C.F.R. §

1 416.927(d) (4). More weight is generally given to the opinion of a
2 specialist about medical issues related to his or her area of
3 specialty than to the opinion of a source who is not a
4 specialist. 20 C.F.R. § 404.1527(d) (5); 20 C.F.R. §
5 416.927(d) (5). The agency will consider other factors that tend
6 to support or contradict the opinion, such as the extent the
7 source understands the disability programs and their evidentiary
8 requirements, and the extent to which an acceptable medical
9 source is familiar with the other information in the case record.
10 20 C.F.R. § 404.1527(d) (6); 20 C.F.R. § 416.927(d) (6). Although
11 the opinions were rendered in April and November 2002 (Tr. 129-
12 36, opinion of Dr. Antoine Dipsia, Tr. 190-97, opinion of medical
13 doctor whose name is illegible), Plaintiff does not point to
14 evidence that undercuts them or renders reliance upon them
15 inappropriate.

16 Here, the ALJ gave specific and legitimate reasons for
17 adopting the opinions, and Plaintiff has not mounted an argument
18 that such opinions were not supported by substantial evidence.

19 Plaintiff notes that the state agency consultants' opinions
20 gave limits which the ALJ did not set out in his RFC or develop
21 where unclear, such as inconsistent limits on reaching. (Brief
22 pp. 6-7.) Plaintiff cites to Tr. 132, where Dr. Dipsia indicated
23 that reaching in all directions, including overhead, was limited,
24 and stated, "[Occasional] overhead reaching due to CTS/back
25 [pain]." The other state agency consultant likewise indicated
26 that there were limitations in the category of reaching all
27 directions (including overhead), and stated, "[N]o freq. OH
28 reaching," (Tr. 193), which the Court interprets as no frequent

1 overhead reaching, or only occasional overhead reaching. These
2 two limitations are not necessarily inconsistent with each other.
3 The ALJ adopted an RFC with no more than occasional overhead
4 reaching. (Tr. 25, 26.) The Court fails to see any inconsistency.

5 IV. Plaintiff's Subjective Complaints

6 Plaintiff complains that the ALJ did not make a credibility
7 finding and that the improperly ALJ failed to consider evidence
8 of subjective complaints.

9 In connection with his determination of Plaintiff's RFC, the
10 ALJ stated that he would consider all of Plaintiff's symptoms,
11 including her pain. (Tr. 21.) He recited Plaintiff's testimony at
12 the hearing concerning her activities of daily living, stress,
13 fatigue, pain, and limitations of standing for twenty minutes,
14 sitting for two hours without leaning forward because of
15 headaches, and lifting five pounds. The ALJ also noted her
16 testimony that she could not vacuum or mop, but was able to
17 perform limited cooking, dishwashing, and laundry activities, and
18 that her son was disabled by cerebral palsy. He also noted that
19 staying on her feet increased her pain and that work and upright
20 positions stressed her back and body, causing spasms of the
21 injured areas. (Tr. 22.)

22 The ALJ noted that Plaintiff's testimony at the prior
23 hearing was consistent with her testimony at the present hearing.
24 The ALJ indicated that absent new and material evidence or
25 changes in legal requirements, the question of making a
26 "subordinate" finding regarding credibility did not arise, and he
27 cited agency sources to this effect. (Tr. 22.) He noted the prior
28 ALJ's finding that Plaintiff was not wholly credible regarding

1 the impact of her impairments on her ability to work, and he
2 stated that there was nothing in the record to warrant reviewing
3 that finding.⁴ However, he also stated that it defied logic not to
4 factor in this prior finding when deciding the issue. (Tr. 22.)
5 The ALJ then reviewed evidence concerning Plaintiff's
6 credibility, which included evidence that came into being both
7 before and after the first hearing decision of December 28, 2000.
8 (Tr. 22.) He noted her medications, secondary gain concerns, a
9 lack of anxiety or depression in September 2001, Plaintiff's
10 stopping her medications in April 2002, lack of treatment in
11 2002-2003, and Plaintiff's statement in April 2000 that her visit
12 to urgent care was primarily to document her falls for two days
13 for Social Security purposes. (Tr. 22, 179.)

14 In considering Dr. Castro's opinion of Plaintiff's abilities
15 on June 18, 2003, the ALJ stated that he was not as sanguine as
16 Dr. Castro, who believed his patient. (Tr. 23.) This was clearly
17 a negative credibility finding. If any doubt were to remain, it
18 would be resolved by the ALJ's express finding that Plaintiff's
19 allegations regarding her limitations were not totally credible
20 for the reasons set forth in the body of the decision. (Tr. 25.)

21 Plaintiff argues that the ALJ failed to consider 1) a letter
22 that Plaintiff wrote to the SSA on March 29, 2002, in which she
23 complained of her attorney's handling of the case; worsening of
24 her back problem, stumbling and falling if she got up without
25 first stretching and exercising, constant body pain, need for
26

27 ⁴ The prior finding was based on Plaintiff's activities of daily living, conservative treatment, few continued
28 symptoms of CTS, and conflicts between information contained in the documentary reports and reports of the
treating and examining practitioners. (Tr. 55-56.)

1 frequent rest during the day, rotation of her left hip inward
2 towards the front which affected her walking and made it painful
3 to stand for very long, and her desire to work; she noted that
4 her son could adjust her neck or back to relieve the pain (Tr.
5 117); 2) a statement dated May 22, 2002, in which Plaintiff
6 stated that to help her back, she slept in a half-sitting
7 position to prevent pain from hip dislocation, adjusted her neck
8 and thoracic area every hour or two during the day, sat carefully
9 supported while driving, avoided much time on her feet, as in big
10 stores, napped daily, adjusted back and hips before getting up in
11 the morning, extra rest before and after traveling out of town,
12 wearing the same clothes to avoid the exhaustion of changing
13 clothes, and spending as little time as possible in food
14 preparation (Tr. 119); 3) and a pain questionnaire filled out by
15 Plaintiff on October 2, 2002, in which Plaintiff described a
16 history of right CTS since 1974, neck, shoulder, and left
17 thoracic pain in 1986, and hips and low back since 1995; she
18 suffered a constant pressure on her spine and joints and neck,
19 and her neck and hips hurt all the time; the pain spread from her
20 neck to her legs and the lower front of her body, as well as the
21 arms and shoulders, and "one part or another [hurt] at all
22 times"; pain was brought on by putting preschoolers on her lap,
23 gripping tools and lifting pans, and standing longer than twenty
24 to thirty minutes or walking more than a block; rest and napping
25 two or three times daily from thirty minutes to two hours helped;
26 her medications, including Elavil several times a month to sleep,
27 Voltaren twice a day (which helped her ovary area), Advil, and
28 Tylenol, but caused drowsiness; she used various belts and

1 halters to relieve pain; she did chores in intervals and rested,
2 getting help with vacuuming and things involving bending over or
3 heavy lifting, and avoiding stressful activities, which
4 intensified the pain; she could do errands without assistance if
5 she did not have to walk far or carry much, she drove, could walk
6 one block outside, stand thirty minutes at a time, and sit an
7 hour and one-half or less; she could drive and use public
8 transportation and could do light housekeeping such as dusting
9 and cooking without assistance. (Tr. 124-26.)

10 Although the ALJ might not have mentioned each one of these
11 individual sources, the basic information contained in them is
12 consistent with the evidence considered by the ALJ in the prior
13 proceeding (disabling CTS right, left neck and shoulder
14 impairment, right hip pain, tendency to stumble if she did not
15 rest, inability to stand more than fifteen minutes or to bend
16 more than thirty minutes, need to adjust her mode of cleaning
17 when caring for her elderly mother and adult disabled son) (Tr.
18 55) and the present proceeding (see preceding summary). It is
19 established that an ALJ need not advert expressly to every item
20 of evidence in order to show that it is considered; rather, the
21 ALJ must discuss evidence that is significant or probative and
22 must explain why it was rejected. Howard ex rel. Wolff v.
23 Barnhart, 341 F.3d 1006, 1011-12 (9th Cir. 2003).

24 The existence and severity of a person's reaction to a
25 physical ailment, such as the existence and severity of pain, are
26 subjective phenomena, the extent of which cannot be objectively
27 measured. Byrnes v. Shalala, 60 F.3d 639, 642 (9th Cir. 1995). In
28 order to reject a claimant's subjective complaints, the ALJ must

1 provide specific, cogent reasons for the disbelief. Lester v.
2 Chater, 81 F.3d 821, 834 (9th Cir. 1995). Once the claimant
3 introduces medical evidence of an underlying impairment that
4 could reasonably be expected to produce some degree of the
5 subjective symptoms, the Commissioner may not discredit the
6 claimant's testimony as to subjective symptoms merely because
7 they are unsupported by objective evidence such as objective
8 medical findings. Id.; Smolen v. Chater, 80 F.3d 1273, 1282 (9th
9 Cir. 1996). Unless there is affirmative evidence tending to show
10 that the claimant is malingering, the reasons for rejecting the
11 claimant's testimony must be clear and convincing, and the ALJ
12 must set forth the rejection by identifying what testimony is not
13 credible and what evidence undermines the claimant's complaints.
14 Lester v. Chater, 81 F.3d at 834. The findings of the adjudicator
15 must be properly supported by the record and must be sufficiently
16 specific to allow a reviewing court to conclude that the
17 adjudicator rejected the claimant's testimony on permissible
18 grounds and did not arbitrarily discredit a claimant's testimony.
19 Bunnell v. Sullivan, 947 F.2d 341, 345-46; Byrnes v. Shalala, 60
20 F.3d at 641-42 (9th Cir. 1995); see 20 C.F.R. § 404.1529(c)
21 [disability] and 20 C.F.R. § 416.929(c) [supplemental security
22 income].

23 Social Security Ruling 96-7p directs the adjudicator to
24 consider not only objective medical evidence of signs, laboratory
25 findings, and medical opinions, but also the following factors
26 when assessing the credibility of an individual's statements:

- 27 1. The individual's daily activities;
- 28 2. The location, duration, frequency, and intensity
of the individual's pain or other symptoms;

3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and adverse side effects of any medication for pain or other symptoms;
5. Treatment, other than medication, for relief of pain or other symptoms;
6. Any measures other than treatment used by the individual to relieve the pain or other symptoms; and
7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

See also Bunnell v. Sullivan, 947 F.2d at 346.

Here, the ALJ adverted to the limitations claimed by Plaintiff in her testimony, which fairly reflected the non-testimonial sources now urged by Plaintiff. (Tr. 32-39.)

Plaintiff contends that the ALJ failed to consider Plaintiff's unsuccessful work attempt and cites to Tr. 3, which is a list of exhibits. (Brief p. 8.) Plaintiff's argument is not supported by a citation to the record that explains the evidentiary basis of Plaintiff's argument. To the extent that Plaintiff is attempting to state an argument, the argument is so undeveloped that it is incapable of assessment. The Court is thus unable to consider Plaintiff's argument and will not do so.

The Court concludes that the ALJ expressly stated clear and convincing reasons for rejecting Plaintiff's credibility, which were based on substantial supporting evidence in the record, including secondary gain concerns, failure to comply with treatment, (Tr. 22), and absent or minimal objective findings (Tr. 22-23). He also adopted by implication the reasons stated by the prior ALJ, which included activities of daily living, conservative treatment, few continued symptoms of CTS, and conflicts between information contained in the documentary reports and reports of the treating and examining practitioners.

1 Johnson v. Shalala 60 F.3d 1428, 1433-34 (9th Cir. 1995); Smolen
2 v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996); Bunnell v.
3 Sullivan, 947 F.2d at 346 (9th Cir. 1991); Thomas v. Barnhart,
4 278 F.3d 947, 958-59 (9th Cir. 2002).

5 V. Ability to Perform Past Relevant Work

6 Plaintiff argues that the testimony of the VE was to the
7 effect that Plaintiff could not perform her past relevant work
8 (PRW) and that the assessment of PRW by the ALJ in the prior
9 decision was incorrect because Plaintiff was not a nursery school
10 attendant as was found and because the previous ALJ had not used
11 a VE in so concluding.

12 The prior ALJ concluded that Plaintiff retained the RFC to
13 perform a full range of light work⁵ avoiding repetitive cervical
14 movements and sitting in a forward position without a back
15 support and without reaching overhead or pushing or pulling more
16 than occasionally; she could perform her PRW of childcare worker,
17 which, pursuant to her report⁶ concerning the position as
18

19 ⁵Light work is defined by 20 C.F.R. § 404.1567(b) (DIS) and
20 20 C.F.R. § 416.967(b) (SSI) as follows:

21 Light work involves lifting no more than 20
22 pounds at a time with frequent lifting or carrying
23 of objects weighing up to 10 pounds. Even though
24 the weight lifted may be very little, a job is
25 in this category when it requires a good deal of
26 walking or standing, or when it involves sitting
27 most of the time with some pushing and pulling of
28 arm or leg controls. To be considered capable of
performing a full or wide range of light work, you
must have the ability to do substantially all of
these activities. If someone can do light work, we
determine that he or she can also do sedentary
work, unless there are additional limiting factors
such as loss of fine dexterity or inability to sit
for long periods of time.

⁶ The record upon which the prior decision was based is not before the Court in this proceeding.

1 performed, involved lifting less than ten pounds, standing for
2 most of the day but requiring only light exertion, and no
3 repetitive cervical movements, sitting in a forward position
4 without a back support, or reaching overhead or pushing or
5 pulling more than occasionally. (Tr. 57.)

6 The present ALJ concluded that Plaintiff could perform her
7 PRW and adopted the findings of the prior ALJ, reasoning that
8 there was no new and material evidence relative to any PRW. (Tr.
9 25.) The ALJ expressly concluded that Plaintiff could perform her
10 PRW of childcare worker as she performed it in the past, and the
11 ALJ stated that this was confirmed by the VE who testified at
12 the present hearing. (Tr. 25.)

13 The VE at the present hearing had clearly reviewed
14 Plaintiff's report regarding her prior jobs (Tr. 101-02) because
15 he opined that Plaintiff's resume was not "too accurate" with
16 respect to identifying her previous jobs. (Tr. 40.) Further, he
17 was present throughout the hearing (Tr. 29) and thus had the
18 benefit of Plaintiff's testimony at the hearing regarding the
19 work she had done in the past, including being an instructional
20 aid in the morning for three years until June 1999 (Tr. 30-31),
21 ten months of day care before and after school working six or
22 seven hours in 1994 and 1995 (Tr. 31-32), and being a preschool
23 worker before that who had planned lessons and supervised
24 children, nap time, teacher's meetings, parent contacts, etc.,
25 (Tr. 32). The ALJ questioned Plaintiff about the positions of
26 daycare supervisor and preschool director that the VE had
27 mentioned as highly skilled jobs on her resume; Plaintiff did
28 those jobs for a month each, which involved some teaching and

1 some administrative paperwork. (Tr. 40-41.) Upon questioning by
2 the VE, Plaintiff testified that when she taught, she taught
3 shapes and colors, and she also read to the children for about
4 twenty minutes. (Tr. 41.)

5 The VE then began testifying without a clear question having
6 been propounded by the ALJ; the ALJ had said, "Just tell me."
7 (Tr. 41.) The VE then responded that he characterized her job as
8 nursery school attendant, DOT 359.677-018, light, SVP 4, no
9 transferable skills; and perhaps child monitor, 301.667-010,
10 medium, SVP 3. (Tr. 41-42.) Immediately after stating these
11 positions, the VE stated, "And I think that pretty much takes
12 care of what she did in actuality." (Tr. 42.) Given this express
13 statement, and further considering the context of the examination
14 of the VE, which related solely to the actual work that Plaintiff
15 had performed, the VE's testimony is reasonably understood as
16 referring to Plaintiff's positions not only as they appear in the
17 DOT⁷ but also as actually performed by her.⁸

18 The VE testified that the difference between a nursery
19 school attendant and child care worker (the latter being the job
20 that the prior ALJ determined was PRW that Plaintiff could
21 perform [Tr. 57]) was that the latter provided services in the
22

23 ⁷All references to the DOT are to the Dictionary of Occupational Titles,
fourth edition revised in 1991.

24 ⁸The position of nursery school attendant as reflected strictly in the
25 DOT and Selected Characteristics involves frequent stooping, reaching, and
26 handling, and occasional kneeling and fingering. United States Dept. of Labor,
27 Selected Characteristics of Occupations Defined in the Revised Dictionary of
28 Occupational Titles at p. 378 (1993). However, the VE testified that one with
a limit to occasional overhead reaching could still perform Plaintiff's PRW
(Tr. 46). Further, he stated that the position involved constant bending and
stooping (Tr. 48), whereas the Selected Characteristics reflected only
frequent (not constant) stooping. Thus, there are additional indicia that the
VE was deviating from the DOT.

1 home and in an institutional setting, and the former only in an
2 institutional setting; however, there was no "child care worker"
3 title in the Dictionary of Occupational Titles (DOT), and the VE
4 did not know how the prior ALJ came up with that term. (Tr. 42-
5 43.) Plaintiff had done all of her work in an institutional
6 setting. (Tr. 42.)

7 The ALJ appeared to acknowledge that in light of Plaintiff's
8 age (62) and education (third year of college) (Tr. 44),
9 Plaintiff would be disabled if she had the RFC attributed to her
10 by the prior ALJ. (Tr. 45.) The present ALJ noted that the prior
11 ALJ had not had a VE; the present ALJ stated that he assumed that
12 Plaintiff's attorney did not appeal, but he then noted that there
13 had been an appeal concluding with the Appeals Council's denial
14 of review. The ALJ noted that the time between the instant filing
15 in April 2002 and the prior event was more than one year but less
16 than four. (Tr. 45-46.) No express statement or ruling was made
17 with respect to reopening.

18 The VE testified that Plaintiff could not perform her PRW of
19 nursery school attendant if she could perform a wide range of
20 light work, avoiding repetitive cervical movements and sitting in
21 a forward position without a back support, and only occasionally
22 performing overhead reaching, pushing, or pulling. (Tr. 44.) She
23 had no transferable skills to transfer to light or sedentary work
24 as a nursery school attendant. (Tr. 44.) The ALJ later
25 acknowledged that this RFC was the one found by the ALJ at the
26 prior hearing. (Tr. 45.) The VE responded to queries regarding
27
28

1 other RFC assessments also.⁹

2 The Court is mindful that the decision of the previous ALJ
3 is not under review, and further that Plaintiff faced a
4 continuing presumption of non-disability. The Court further notes
5 the Plaintiff's own report of her past work (Tr. 102) indicated
6 walking and standing five to seven hours; lifting less than ten
7 pounds; sitting one hour; no climbing; no information about
8 stooping, and dashes with respect to crouching, crawling, and
9 handling, grasping, or grabbing big objects; and one-half hour of
10 kneeling. However, no affirmative information is given with
11 respect to repetitive cervical movements, sitting in a forward
12 position without a back support, or frequency of reaching
13 overhead, pushing, or pulling.

14 It might be possible to isolate Plaintiff's own work report
15 as some support for the ALJ's decision. However, this Court's
16 task is to consider the evidence in light of the record as a
17

18 ⁹The VE further testified that Plaintiff could perform her PRW if
19 Plaintiff could lift twenty pounds occasionally and ten pounds frequently;
20 stand, bend, or walk about six; sit about six; and engage in only occasional
21 overhead reaching. (Tr. 46.)

22 The VE testified that Plaintiff could not perform her PRW if she needed
23 frequent breaks, could lift fifteen pounds frequently, twenty-five pounds
24 occasionally, and had postural limitations of no frequent bending, stooping,
25 and crouching. (Tr. 46.)

26 When questions arose as to the reason for the different results, the ALJ
27 posed or reposed a question concerning an RFC of standing and walking at least
28 six hours, a need for frequent breaks, unrestricted sitting, lifting fifteen
pounds frequently and twenty-five pounds occasionally, with "[p]osterior
limitations" (Tr. 47) and bending, stooping, and crouching to be performed
occasionally. The VE explained that frequent breaks and occasional "posterior"
did not fit her PRW; further, frequent breaks were what sank that third RFC
hypothetical. (Tr. 48.) Further, the last two RFC's had occasional posterior
limitations that did not fit the PRW because of constant bending and stooping.
(Tr. 48.) Thus, Plaintiff could not perform her PRW if the RFC included the
limitations of frequent breaks or only occasional stooping and bending. (Tr.
48.)

 The VE testified that Plaintiff could perform her PRW if she had no
transferable skills, could lift twenty pounds occasionally and ten pounds
frequently, could stand and/or walk about six hours, sit about six, with
occasional postural limitations, and no frequent overhead reaching. (Tr. 46.)

1 whole, weighing both the evidence that supports and the evidence
2 that detracts from the Commissioner's conclusion; it may not
3 simply isolate a portion of evidence that supports the decision.
4 Further, reference to the ALJ's decision reveals that the ALJ
5 himself understood the VE to have confirmed that Plaintiff could
6 perform her PRW. (Tr. 25.) The ALJ expressly concluded that there
7 was no new and material evidence relative to any PRW as a
8 childcare worker as she performed it in the past. It thus appears
9 that the ALJ completely misapprehended or failed to consider the
10 VE's testimony that if Plaintiff had the RFC attributed to her by
11 the ALJ, she could not perform her PRW as performed. Contrary to
12 the ALJ's conclusion, the VE did not confirm the finding of the
13 previous ALJ; rather, the VE noted that there was no position in
14 the DOT reflecting the previous ALJ's assessment of Plaintiff's
15 PRW, and he instead appeared to characterize her work as actually
16 performed, concluding that with her RFC, she could not perform
17 it.

18 The ALJ appears to have failed to consider this new and
19 material evidence at step four. Further, given this omission from
20 the analysis, the ALJ did not determine whether there were
21 departures from the DOT and Selected Characteristics that were
22 supported by persuasive evidence. The ALJ will be given an
23 opportunity to consider the testimony of the VE regarding
24 Plaintiff's past relevant work, hold a new hearing and consider,
25 as appropriate, any further testimony from a VE and from
26 Plaintiff concerning Plaintiff's past relevant work, ability to
27 perform her past relevant work in light of the RFC already
28 established, and, if appropriate, ability to perform work that

1 exists in significant numbers in the economy.

2 RECOMMENDATION

3 Based on the foregoing, the Court concludes that the ALJ's
4 decision was not supported by substantial evidence in the record
5 as a whole and was not based on proper legal standards.

6 Accordingly, it IS RECOMMENDED that

7 1. Plaintiff's social security complaint BE GRANTED, and

8 2. The matter BE REMANDED pursuant to sentence four of 42
9 U.S.C. § 405(g) for further consideration, consistent with this
10 decision, of Plaintiff's status as disabled, including whether or
11 not with the RFC found by the ALJ, Plaintiff could perform her
12 past relevant work, and, if appropriate, whether on the basis of
13 the Plaintiff's age, education, work experience, and residual
14 functional capacity, she could perform any other gainful and
15 substantial work within the economy; and

16 3. Judgment BE ENTERED for Plaintiff Arlene C. Johnson and
17 against Defendant Jo Anne B. Barnhart.

18 This report and recommendation is submitted to the United
19 States District Court Judge assigned to the case, pursuant to the
20 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
21 Local Rules of Practice for the United States District Court,
22 Eastern District of California. Within thirty (30) days after
23 being served with a copy, any party may file written objections
24 with the court and serve a copy on all parties. Such a document
25 should be captioned "Objections to Magistrate Judge's Findings
26 and Recommendations." Replies to the objections shall be served
27 and filed within ten (10) court days (plus three days if served
28 by mail) after service of the objections. The Court will then

1 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
2 (b) (1) (C). The parties are advised that failure to file
3 objections within the specified time may waive the right to
4 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
5 1153 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8 **Dated: January 26, 2007**
9 icido3

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE